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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

THE CITY OF OMAHA, DOUGLAS COUNTY, NEBRASKA, A MUNICIPAL CORPORATION; ALVIN GRIGSBY; AND JOHN FRIEND,

Petitioners,

vs.

LU ANN BUFFKINS,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether it is the proper exercise of First Amendment free speech rights for a person to call a police officer an "asshole" in a confrontational setting or whether established Supreme Court precedent extends to police officers the protections of the "fighting words" exception to free speech rights.

II.

Whether the "fighting words" exception to First Amendment free speech rights should view police officers as less susceptible to verbal abuse and incitement and should extend greater First Amendment freedoms for persons to direct verbal abuse towards police officers which would not be constitutionally protected if addressed to the ordinary person.

LIST OF PARTIES TO THE PROCEEDING

All the parties to the proceeding are named in the caption.

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THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS

1. The United States Court of Appeals
   For the Eighth Circuit
   No. 90-1319
   Submitted: November 14, 1990
   Filed: December 28, 1990
   The opinion, in the form of a slip opinion, is set forth in full in Appendix A (App. 1). The opinion is reported at 922 F.2d 465 (1990).

2. The United States District Court
   For the District of Nebraska
   CV 87-0-370
   Filed: September 1, 1989
   The judgment is set forth in full in Appendix E (App. 25). A copy of the transcript of the district court's oral ruling denying plaintiff's motion for a directed verdict on the "fighting words" issue is attached as Appendix D (App. 23) and the instruction upon which the court submitted the issue to the jury is attached as Appendix G (App. 28).

GROUNDS FOR JURISDICTION

On December 28, 1990, judgment was entered by the Eighth Circuit Court of Appeals affirming the judgment of the district court as to the dismissal of Appellant LuAnn Buffkins' claim under 42 USCS § 1981, but otherwise vacating the judgment in favor of the defendants (petitioners), and remanding all of Buffkins' remaining claims, both state and federal, to the district court for a new trial. The Eighth Circuit specifically held that Buffkins' speech directed at the defendant police officers could not constitute "fighting words" which are not protected by the First Amendment. On February 15, 1991, the Eighth Circuit issued an order denying appellee's Petition for Rehearing and Suggestion for Rehearing En Banc.

Petitioners seek review by Petition for Certiorari. Jurisdiction to review the judgment of the Eighth Circuit Court of Appeals is conferred upon this Court by 28 USCS §§ 1254(1), 2101(c), and 2106.

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED IN THE CASE

FIRST AMENDMENT TO THE CONSTITUTION

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

SECTION 1 OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

SECTION 20-42 OF THE MUNICIPAL CODE OF OMAHA, NEBRASKA

Sec. 20-42. Disorderly conduct.

It shall be unlawful for any person purposely or knowingly to cause inconvenience, annoyance or alarm or create the risk thereof to any person by:

(a) Engaging in fighting, threatening or violent conduct; or

(b) Using abusive, threatening or other fighting language or gestures; or

(c) Making unreasonable noise.

STATEMENT OF THE CASE

The Airport Stop and Arrest

The evidence at trial showed that on March 17, 1987, Omaha Police Officers Alvin Grigsby and John Friend went to Omaha's Eppley Airport after receiving a tip from a reliable informant that a black person or persons would be carrying cocaine into Omaha on a flight from Denver, Colorado. Upon arriving at the airport the officers began to observe persons waiting for the only flight which would arrive from Denver at the time specified by the tip. When the flight arrived, the officers saw only one black person leave the plane: LuAnn Buffkins. Buffkins immediately joined a woman the officers testified they had seen waiting nervously. The women then left the gate area and the officers followed.

As the women rode the escalator down into the airport ticketing and baggage area the officers could see that Buffkins carried a Teddy bear with seams which appeared to have been opened and resewn. The officers recognized such a parcel as a common means to transport illegal drugs. When the women stopped at the baggage carousel, the officers approached them. After showing their police badges and identifying themselves, the police officers engaged the women in conversation. All witnesses agreed

that neither officer told Buffkins she was under arrest but merely said they were conducting an investigation into possible drug transporting and asked if the women would answer some questions. Buffkins became defensive and demanded more identification, which was promptly given. After some discussion about the officers' identities, Buffkins went with the officers to a private office to continue the discussion. During their walk, Buffkins repeatedly asserted she knew her rights and cited several constitutional provisions; however, in her testimony she agreed that she made no attempt to walk away or disengage the officers.

When they reached the office, the officers asked Buffkins questions about her trip. The officers testified that Buffkins asserted she didn't have to answer any questions and refused permission for the officers to look at her luggage. No search of the luggage was then conducted. During the conversation Buffkins became increasingly belligerent. She began to taunt and personally insult the officers, saying their breath stunk, and that they were "Starsky and Hutch" television cops. After a short time, the officers told Buffkins she was free to go and motioned toward the door.

All witnesses agreed that, as Officer Friend opened the door for Buffkins, he apologized for the inconvenience and said: "Have a nice day." The officers testified Buffkins responded: "I will have a nice day, asshole." Buffkins contended at trial that she responded: "Asshole system." Professor Timothy Jay, a professor of psychology specializing in the use of taboo or obscene speech who testified on behalf of plaintiff, testified he doubted that a

person would use the word "asshole" in the manner plaintiff claimed.

Buffkins was arrested and charged with violating Omaha Municipal Ordinance 20-42 which prohibits disorderly conduct through the use of fighting words or conduct or the making of unreasonable noise. In *State v. Groves*, 219 Neb. 382, 363 N.W.2d 507 (Neb. 1985), the Nebraska Supreme Court had construed the first two subsections of Omaha Municipal Code § 20-42 as prohibiting fighting words or conduct. That is, "those words which by their very utterance inflict injury or tend to incite an immediate breach of the peace." 363 N.W.2d at 510, quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). (A copy of the Nebraska Supreme Court's decision is attached as Appendix H, App. 30-48). Officer Friend testified he arrested plaintiff because of the words she used against him.

This Lawsuit

In May 1987, LuAnn Buffkins filed her Complaint in the United States District Court for the District of Nebraska against the City of Omaha and the two police officers, Alvin Grigsby and John Friend. The plaintiff invoked the district court's jurisdiction under 28 U.S.C.S. § 1343(a)(3) and (4) and 28 U.S.C.S. § 1331. The action was brought to enforce rights accorded by 42 U.S.C.S. §§ 1981, 1983 and 1988, and the First, Fourth, and Fourteenth Amendments to the United States Constitution.

In her Complaint, Buffkins alleged her arrest was due to her race, that the disorderly conduct ordinance is unconstitutional on its face, that her arrest was without

probable cause, and that her arrest violated her First Amendment rights.

The District Court's Rulings and the Jury's Verdict

By order of March 31, 1989, the District Court for the District of Nebraska, Chief Judge Lyle E. Strom, ruled that the subsection of Omaha ordinance § 20-42 prohibiting disorderly conduct by the making of unreasonable noise is unconstitutionally vague and violates the Fourteenth Amendment to the United States Constitution. That ruling was not appealed.

After a three day trial, Judge John B. Jones, visiting judge, denied plaintiff's motion for a directed verdict on whether the officers had probable cause to support plaintiff's arrest. The trial judge rejected plaintiff's argument that plaintiff's use of the word "asshole" to Officer Friend as a matter of law is not a fighting word. [App. F, 26-27]. The trial court submitted to the jury the question of whether plaintiff used fighting words toward Officer Friend [App. G, 28].

The jury returned a verdict in favor of all defendants and judgment was entered on the verdict. [App. E, 25]. Plaintiff's motion for judgment notwithstanding the verdict was subsequently denied [App. D, 23] and plaintiff perfected her appeal.

The Court of Appeals' Opinion

The Eighth Circuit Court of Appeals reversed the verdict, holding that Buffkins' words were not, as a matter of law, "fighting words" as defined by *Chaplinsky v.*

New Hampshire, 315 U.S. 568, 572 (1942) and its successors. The appeals court gave little explanation and cited only a case from the City Court of Rochester, New York, and a case from the Indiana Supreme Court to support its position.

The appeals court used a result-determinative test to decide whether Buffkins' words were fighting words not protected by the First Amendment and reasoned that the words could not be fighting words because Buffkins had not "become violent or threatened violence". Further, the appeals court used a subjective, listener-oriented test, concluding that, because great restraint is expected from police officers and the First Amendment protects "criticism and challenge" directed toward police, the words at issue here could not, as a matter of law, be fighting words when directed to police officers. The appeals court said:

> In addition, Buffkins' use of the word "asshole" could not reasonably have prompted a violent response from the arresting officers. In *Houston v. Hill*, 482 U.S. 451, 462 (1986), the Supreme Court recognized that the "fighting words" doctrine may be limited in the case of communications addressed to properly trained police officers because police officers are expected to exercise greater restraint in their response than the average citizen.

The *Houston* Court stated:

> [T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers. . . . The freedom of individuals verbally to oppose or challenge police action without thereby

> risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.

Id. at 461-63.

[App. A, 17-18]. The appeals court did not note the express distinction this Court made in *Houston v. Hill,* 482 U.S. at 463, n.12 between the freedom of persons to oppose or challenge police action and the lack of constitutional protection accorded "fighting words" addressed to police.

ARGUMENT

I.

THE EIGHTH CIRCUIT'S DECISION THAT A PERSON HAS THE FIRST AMENDMENT RIGHT TO CALL A POLICE OFFICER AN "ASSHOLE" IN A CONFRONTATIONAL SETTING IS CONTRARY TO ESTABLISHED SUPREME COURT PRECEDENT AND DIRECTLY CONFLICTS WITH A DECISION BY THE NEBRASKA SUPREME COURT.

Twice before, the question of whether society has sufficiently changed so as to extend First Amendment freedoms to a person verbally taunting, ridiculing and cursing police officers has stood at the edge of this Court's rulings. This Court has twice issued opinions mentioning the First Amendment right to verbally criticize and challenge police officers performing their duties in conjunction with mention of verbal confrontations with police which would otherwise not be constitutionally protected. This dicta has been seized upon by the Eighth Circuit Court of Appeals as a statement refashioning and

limiting the long-established "fighting words" exception to First Amendment rights.

In concurring in the result of *Lewis v. City of New Orleans*, 415 U.S. 130, 135 (1974), Mr. Justice Powell agreed that the ordinance at issue created a per-se fighting words rule for words used toward police and, for that reason, was unconstitutionally overbroad. He pointed out that "words may or may not be 'fighting words,' depending upon the circumstances of their utterance." 415 U.S. 135. To illustrate circumstances where the ordinance could encroach upon constitutionally protected speech, Mr. Justice Powell noted that the words at issue in the case would be unlikely to precipitate a physical confrontation between a middle-aged woman and a police officer. He then used a more general illustration:

> Moreover, as noted in my previous concurrence [in the remand of the case], a properly trained officer may reasonably be expected to "exercise a higher degree of restraint" than the average citizen, and thus be less likely to respond belligerently to "fighting words."

415 U.S. 135. Justice Powell's general illustration of why a per-se fighting words rule was unwise was later repeated by the majority opinion in *City of Houston v. Hill*, 482 U.S. 451, 462 (1987).

The general language of the concurring opinion in *Lewis v. New Orleans*, supra, and it's repetition in *Houston v. Hill*, supra, has blurred the boundaries of the "fighting words" exception to First Amendment freedoms. This Court needs to clearly state whether words which could

otherwise tend to invoke a violent response in the ordinary listener gain constitutional protection simply because the words are addressed to a police officer.

As a result of Mr. Justice Powell's comments in *Lewis v. New Orleans* and the lack of clarification, a hodgepodge of rules has arisen in the state courts and the lower federal courts. These decisions present conflicts in the proper constitutional rule to apply in judging the First Amendment's scope when verbal abuse is aimed toward a police officer. The Eighth Circuit Court of Appeals has now joined in this array of cases. The Eight Circuit, however, went beyond any reasonable implication which can be read from Mr. Justice Powell's comments and adopted a rule as constitutionally and socially undesirable as the per-se rule struck down in *Lewis v. New Orleans,* supra. The Eighth Circuit Court of Appeals has adopted a per-se rule implying that virtually no words can be "fighting words" when used toward a properly trained police officer.

In circumstances where the words at issue are spoken to a police officer, the state courts have gained little direction from this Court's most recent pronouncements on the fighting words doctrine. Some courts have established a special standard in judging fighting words used toward a police officer. Other courts have rejected any special standard. Because the rule has now become further clouded, the issue presents fertile ground for further split of opinion and should be clarified by this Court.

The state courts have established two main bodies of law interpreting the fighting words doctrine when the words are spoken to a police officer. Cases favoring a

standard requiring a higher degree of inflammatory language when the police officer is the offended listener include *State v. Duhan*, 460 A.2d 496, 499 (Conn. 1982), rev'd on other grounds, 481 A.2d 48 (1984); *State v. Nelson*, 448 A.2d 214 (Conn. 1982); *Phillips v. State*, 314 So. 2d 619, 621-622 (Fla. App. 1975); *State v. John W.*, 418 A.2d 1097 (Me. 1980); *Diehl v. State*, 451 A.2d 115 (Md. 1982), cert. den. 460 U.S. 1098 (1983); *City of Alamogordo v. Ohlrach*, 625 P.2d 1242, 1243 (N.M. Ct. App. 1981); and *State v. Yoakum*, 638 P.2d 1264, 1266 (1982). On the other hand, other jurisdictions have refused to apply a special standard or have not imposed special standards in cases involving a police officer listener. *Bousquet v. State*, 548 S.W.2d 125 (Ark. 1977); *Duncan v. United States*, 219 A.2d 110, 112-13 (D.C. 1966), remanded on other grounds, 379 F.2d 148 (D.C. Cir. 1967); *City of Little Falls v. Witucki*, 295 N.W.2d 243, 245-46 (Minn. 1980); *City of St. Paul v. Azzone*, 177 N.W.2d 559 (Minn. 1970); *City of St. Paul v. Morris*, 104 N.W.2d 902, 903 (1960), cert. denied 365 U.S. 815 (1961); *State v. Brown*, 303 A.2d 886, 888 (N.J. 1973); *Lane v. Collins*, 138 N.W.2d 264, 267 (Wis. 1965); *State v. Beck*, 682 P.2d 135 (Kan. App. 1984); *Commonwealth v. Pringle*, 450 A.2d 103, 106 (Pa. Superior 1967); *Pringle v. Court of Common Pleas*, 604 F. Supp. 623, 629 (M.D. Pa. 1985); *City of Cincinnati v. Karlan*, 298 N.E.2d 573, 577 (Ohio 1973); see *Musselman v. Commonwealth*, 705 S.W.2d 476, 477 (Ky. 1986); see *Bolden v. State*, 251 S.E. 2d 165, 166 (Ga. App. 1978).

The lack of clear direction from this Court has led to such differing positions as those taken by the courts of Maine, Pennsylvania, and Nebraska. In *State v. John W.*, supra, the Maine Supreme Court attempted to analyze

this Court's First Amendment "fighting words" cases and expressly adopted a view it distilled from Justice Powell's concurring opinion in *Lewis v. New Orleans*, supra. The court said:

> We presume that a police officer would not so readily respond violently to conduct of the sort engaged in by John W. To constitute a violation in these circumstances the conduct must be egregiously offensive, so offensive as to have a direct tendency to cause a violent response even from a police officer.
>
> . . .
>
> But epithets directed at police officers are not fighting words merely because they might be so if directed at some other person. The nature of the experience, training and responsibilities of police officers must be considered in determining whether a given defendant's language constituted fighting words.

418 A.2d at 1106-07. However, in *Pringle v. Court of Common Pleas*, 604 F. Supp. 623, 629 (M.D. Pa. 1985) the United States District Court for the Middle District of Pennsylvania saw police in a very different light. The court said:

> Petitioner argues that since her words were addressed to police officers – individuals who by virtue of their occupation are trained to remain disspassionate under pressure – that we cannot logically conclude that her words were likely to provoke violence from these addressees. In other words, Petitioner seems to be implying that it is virtually impossible to find the phrase which, when addressed to a police officer, will constitute 'fighting words'. Common sense dictates otherwise.
>
> Police officers, notwithstanding their devotion to their duty and the excellence of their training,

> are human beings and subject to the same failings as butchers, bakers and candlestick makers. We do not see the logic in finding that police officers can be expected to remain stoic in the face of vitriolic comments that one would expect to elicit violence from someone else. Moreover, we think it contrary to public policy to send out a signal to the general public that policemen are fair game for any amount of verbal abuse some may choose to heap upon them.

604 F. Supp. at 629. Similarly, in *State v. Groves,* 219 Neb. 382, 363 N.W.2d 507 (Neb. 1985), the Supreme Court of Nebraska has said:

> [W]e again specifically reject the implicit argument advanced by appellant that a police officer is somehow less susceptible to abuse than other members of the general public. As we said in [State v.] Boss [195 Neb. 467, 471, 238 N.W.2d 639, 643 (1976)]:
>
> > We specifically reject the authority of *Williams v. District of Columbia,* 419 F.2d 638, and the concurrence of Mr. Justice Powell in *Lewis v. City of New Orleans,* supra, wherein it is suggested that the words here used cannot be fighting words when directed to a police officer because he is trained to accept such abuse without violent reaction.

219 Neb. at 386. [App. H, 33-34].

The Eighth Circuit Court of Appeals has accepted the "fighting words" rule rejected by the Pennsylvania federal court, the Supreme Court of Nebraska, and the highest court of many other states. In holding that, as a matter of law, Buffkin's words could not incite a violent response in a police officer, the court is reasoning that a word's ability to incite persons must be measured by the self control expected of the person to whom it is directed.

This holding misreads the decision in *Houston v. Hill*, 482 U.S. 451 (1986) and fashions a new standard of constitutional protections in conflict with the long-established rule of *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). These cases do not support a holding that calling a police officer an "asshole" in an antagonistic, confrontational manner is, as a matter of law, protected speech.

Police officers in Nebraska and other states where the judiciary has viewed police officers as human beings susceptible to abuse are now caught between that view and the conflicting rule pronounced by courts such as the Eighth Circuit Court of Appeals which see the *Lewis v. New Orleans*, supra, concurring opinion as establishing a new boundary for free speech toward police. The Nebraska legislature, and the legislatures of other states within this circuit, are unable to criminalize the conduct which would otherwise be permitted by this Court's pronouncements in *Chaplinsky*, supra, and its progeny. This Court should grant review to resolve this conflict.

II.

THIS COURT SHOULD CLARIFY THE EXTENT TO WHICH FIRST AMENDMENT FREEDOMS PERMIT VERBAL ABUSE OF POLICE IN THE PERFORMANCE OF THEIR DUTIES.

The circuit court went further than just defining "asshole" as a matter of law; it crafted an exception to this Court's definition of "fighting words". The circuit has changed the focus of the definition from the reaction of an "average addressee" to the reaction of "properly trained police officers" and has called personal abuse of police a form of protected expression.

The Eighth Circuit's holding that the fighting words doctrine has a subjective, listener-oriented element creates confusion in applying the doctrine to any circumstance where the speaker should believe the listener is self-disciplined and not likely to respond with violence regardless of the abuse. The Eighth Circuit's holding implies that the true test of "fighting words" is not the words' ability to incite, but the speaker's expectation that the listener will turn the other cheek instead of reacting violently. Such a rule opens every "fighting words" determination to an examination of the expected sensitivities and restraint of the listener. For example, would not a speaker expect a priest or nun to exercise greater restraint than the average citizen? If the listener's expected restraint is the test, as the Circuit suggests, then a priest or nun cannot be the target of "fighting words" under the Eighth Circuit's test. The list of immune persons will inevitably grow beyond any capability to predict. Without direction from this Court, courts adopting the rationale of the Eighth Circuit will be left to force the "fighting words" doctrine further from the purpose expressed in long-established opinions of this Court, an effective standard for determining constitutionally unprotected speech will be lost, and First Amendment case determinations will be left to degenerate into a petty examination of the listener's sensitivity to abuse.

In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), this Court fashioned the expression of the "fighting words" exception to free speech. The concept was not new or one requiring leaps of logic. The concept of which the Court spoke was one familiar to anyone exposed to human existence on the streets of society in 1942 or today.

Of course, this person is most commonly the police officer. And, it was in the context of verbal abuse of a law enforcement officer that the "fighting words" doctrine was initially stated. In upholding a statute under which the defendant was charged with addressing offensive words to a City Marshall, the Court said:

> [I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd, and obscene, the profane, the libelous, and the insulting or 'fighting' words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the constitution, and its punishment as a criminal act would raise no question under that instrument.

Id. at 572. Significantly, the Court spoke of measuring "fighting words" by the epithets' likelihood to "provoke the *average person* to retaliation, and thereby cause a breach of the peace." Id. at 574 (emphasis added).

The Court subsequently refined and reaffirmed the formulation and application of the "fighting words" doctrine, but continued to speak of the test as an objective

test measured by the "ordinary citizen." *Cohen v. California,* 403 U.S. 15, 20 (1971). A different standard for the police officer to whom the epithets were so often addressed was not felt necessary. When faced with the opportunity to fashion a special test for fighting words addressed to police officers, the Court generally remanded the case to the state courts for reconsideration in light of existing announced standards. See, Tribe, *American Constitutional Law,* sections 12-10, pages 617-623, and cases cited at n. 5.

The comments by Mr. Justice Powell which the Eighth Circuit Court of Appeals here elevated to the status of a federal constitutional principle were first made in Justice Powell's concurrence when the Court remanded the case for the Louisiana Supreme Court to construe the meaning of the challenged ordinance. *Lewis v. New Orleans,* 408 U.S. 913 (1972). When the case was considered after remand, Mr. Justice Powell merely repeated his comments in recounting his reasons for concurring in the majority's finding that the ordinance was facially overbroad. *Lewis v. New Orleans,* 415 U.S. 130, 135 (1974).

A concern with the direction inappropriate reliance on his concurring comments could lead was expressed by Justice Powell when he concurred in the judgment in part and dissented in part in *Houston v. Hill,* 482 U.S. 451, 479-480 (1987). Justice Powell agreed that the ordinance in question could be applied to reach First Amendment protected speech, but he warned that the statements in the court's opinion regarding First Amendment protections of speech directed at police officers were unnecessarily broad. 482 U.S. at 474. He suggested the majority opinion was misapplying his *Lewis* concurring comments.

The Eighth Circuit Court of Appeals here, and other courts which view the constitution as expecting police to be immune from those words likely to provoke the "average" or "ordinary" person, should read closely Justice Powell's statements in *Houston v. Hill*, supra:

> I do agree that the ordinance can be applied to speech in some cases. And I also agree that the First Amendment protects a good deal of speech that may be directed at police officers. On occasion, this may include verbal criticism, but I question the Court's opinion that the First Amendment generally protects verbal "challenge[s] directed at police officers," ante, at 2509. A "challenge" often takes the form of opposition or interruption of performance of duty. In many situations, speech of this type directed at police officers will be functionally indistinguishable from conduct that the First Amendment clearly does not protect. . . .
>
> . . . To be sure, there is a fine line between legitimate criticism of police and the type of criticism that interferes with the very purpose of having police officers. But the Court unfortunately seems to ignore this fine line and to extend First Amendment protection to any type of verbal molestation or interruption of an officer in the performance of his duty.

482 U.S., 479-80.

This Court should grant certiorari and use this case as an opportunity to narrow the emphasis placed by the Eighth Circuit and other courts upon Mr. Justice Powell's concurring comments in *Lewis*. It serves no purpose for constitutional doctrines to evolve in the lower courts through misapplication of illustrative comments in a Supreme Court concurring opinion. The doctrine of

"fighting words" when applied to confrontations with police officers should be permitted to continue to reflect the purpose for which the doctrine was intended when it was fashioned in *Chaplinsky v. New Hampshire,* supra, many years ago. As was stated by Mr. Justice Blackmun in dissenting from the court's opinion in *Lewis v. New Orleans,* supra:

> Police officers in this day perhaps must be thick skinned and prepared for abuse, but a wanton, high-velocity, verbal attack often is but a step away from violence or passioned reaction, no matter how self-disciplined the individuals involved. In the interest of the arrested person who could become the victim of police overbearance, and in the interest of the officer, who must anticipate violence and who, like the rest of us, is fallibly human, legislatures have enacted laws of the kind challenged in this case to serve a legitimate social purpose and to restrict only speech that is "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." *Chaplinsky,* supra, at 572, 86 L. Ed 1031. In such circumstances we should stay our hand and not yield to the absolutes of doctrine.

415 U.S. 141-142, Chief Justice Burger and Justice Rehnquist, joining in dissent. The decision of the Eighth Circuit Court of Appeals, here, has effectively eliminated a legislature's ability to enact laws to serve that legitimate social purpose and eliminated the police officer's ability to enforce such laws by arrest for verbal attacks upon the officer.

The jury should here be allowed to decide if Buffkins used the word "asshole" to express criticism of the police actions or as a personal epithet and personal abuse. It should

not stretch the imagination of this Court or any reader of the Circuit Court's opinion to envision a situation where this epithet provokes a violent response from an "ordinary citizen" or from a trained police officer. The Eighth Circuit's decision has prevented the jury from making that determination solely due to a misapprehension of the boundaries of free speech. The constitution does not, and should not, grant persons uttering fighting words greater protection simply because the object of the words is trained to exercise restraint.

Without more, the resolution of the conflict in constitutional interpretation between the courts using a stricter standard in applying the "fighting words" doctrine to verbal attacks upon police and the courts viewing police as fallible human beings merits review in this Court. But, further, review is appropriate so a generally stated comment used to illustrate potential problems of overbreadth in an ordinance does not become elevated through misapplication to the status of a constitutional principle.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES E. FELLOWS
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Counsel of Record
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APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-1319

Lu Ann Buffkins, Appellant, v. City of Omaha, Douglas County, Nebraska, a Municipal Corporation; Alvin Grigsby; and, John Friend, Appellees.	* * * * * * * * * * * *	Appeal from the United States District Court for the District of Nebraska.

Submitted: November 14, 1990

Filed: December 28, 1990

Before LAY, Chief Judge, FAGG, Circuit Judge, and LARSON,* Senior District Judge.

LAY, Chief Judge.

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*The HONORABLE EARL R. LARSON, Senior United States District Judge for the District of Minnesota, sitting by designation.

Lu Ann Buffkins brought suit against the City of Omaha and two Omaha police officers, Alvin Grigsby and John Friend, for deprivation of her constitutional rights under Title 42 section 1983 of the Civil Rights act.[1] The suit arose out of an alleged illegal search and seizure and wrongful arrest. The complaint also challenged the constitutionality of a disorderly conduct ordinance of the City of Omaha under which the arrest was allegedly made. Buffkins also claimed she had been discriminated against because of her race in violation of section 1981.[2]

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[1] Section 1983 provides as follows:

> Every person who, under color of [state law] . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . for redress.

42 U.S.C. § 1983 (1988).

[2] Section 1981 states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to . . . sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.

42 U.S.C. § 1981 (1988).

At the close of Buffkins' case in chief the district court[3] concluded that there was insufficient evidence that the City of Omaha had any policy or custom that would subject it to liability under either section 1981 or 1983 and therefore dismissed the City of Omaha from the case. The district court also found no evidence of racial discrimination and therefore dismissed plaintiff's claim under section 1981. The district court further ruled as a matter of law that the officers did not illegally seize Buffkins and accordingly directed a verdict on behalf of the defendants on plaintiff's Fourth Amendment claim. Buffkins' motions for directed verdict and judgment notwithstanding the verdict were overruled. The court submitted the state pendant claims of false arrest, false imprisonment, malicious prosecution, and intentional infliction of emotional distress to the jury. The jury returned a verdict in favor of the defendant officers.

We affirm the district court's dismissal of plaintiff's claim under section 1981. We otherwise reverse and remand for a new trial all of plaintiff's other claims. We also order the reinstatement of plaintiff's claim against the City of Omaha.

FACTS

On March 17, 1987, Omaha police received a tip that cocaine would be imported into the Omaha area before 5:00 p.m. by a black person or persons arriving on a flight from Denver. Officers Grigsby and Friend planned to

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[3] The Honorable John B. Jones, United States District Judge for the District of South Dakota, sitting by designation.

meet at the Omaha airport to follow up on the tip. Both officers had a working knowledge of the "drug courier profile"[4] and Grigsby had received special training from the Drug Enforcement Agency ("DEA") concerning interception of drug couriers in airports. Officer Grigsby expressed concern over the vagueness of the tip but decided to proceed to the airport to meet Friend.

The officers, dressed in plain clothes, met at the airport at approximately 2:30 p.m. The officers decided to monitor a flight that was scheduled to arrive from Denver at 3:40 p.m. The flight the officers watched was approximately one-half hour late. While surveying the deplaning passengers, the officers noticed Buffkins, the only black person exiting the plane. Buffkins was met by her sister, Hollis, at the gate. The officers later claimed that Hollis appeared nervous. Buffkins' other sister, Cheryl Nwachakwu, joined Buffkins and Hollis near the escalator leading down to the baggage carousel. The officers noticed that Buffkins carried a teddy bear with seams that appeared to have been resewn. Buffkins handed the teddy bear to Nwachakwu. Hollis left the airport without taking the teddy bear with her.

Grigsby approached Buffkins and Nwachakwu, identified himself as an officer conducting a narcotics investigation, and upon Buffkins' request presented identification. Grigsby and Friend then requested Buffkins to bring her luggage and come with them to answer

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[4] The drug courier profile is an informal compilation of characteristic behaviors believed to be typical of persons carrying unlawful narcotics. *Reid v. Georgia*, 448 U.S. 438, 440 (1979) (per curiam).

questions. Nwachakwu was told she could leave. When Buffkins asked the officers who they were looking for, the officers told her about the tip.

The Officers picked up two of Buffkins' suitcases and escorted Buffkins and Nwachakwu to an office located on the other side of the terminal. On the way to the office, Buffkins protested that the officers' conduct was racist and unconstitutional. Buffkins claims that she believed she has no choice but to cooperate with the officers' investigation and that neither officer told her she was free to go. Inside the security room, Buffkins gave the officers her driver's license and airline ticket, neither of which were suspicious. When Friend kneaded and felt the teddy bear, he did not detect any indication of contraband. Buffkins allegedly became increasingly loud during the interrogation. When the officers asked Buffkins if they could search her luggage, she refused, citing her rights under the Fourth Amendment. The officers eventually informed Buffkins that she was free to go and told her to "have a nice day," to which she replied "asshole system" or "I will have a nice day, asshole."[5] The officers then decided to arrest Buffkins for disorderly conduct.[6] When

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[5] Buffkins testified that she said the words "asshole system." Jt. App. at 82. Officer Friend testified that Buffkins said "I will have a nice day, asshole." Jt. App. at 202. Officer Grigsby and Nwachakwu heard only the word "asshole." Jt. App. at 242.

[6] Buffkins was then taken to Central Headquarters, booked and released on bond. On May 4, 1987, she returned to Omaha to defend herself against the charge of disorderly conduct and was found not guilty.

the officers told Buffkins they would have to confiscate her luggage and inventory it, Buffkins refused. The officers then allowed Nwachakwu to open and inspect Buffkins' luggage in their presence. It is undisputed that Buffkins was not carrying any drugs or contraband.

Both officers testified that Buffkins did not fit the drug courier profile and that they did not rely on the profile as a basis to stop Buffkins.[7]

ANALYSIS

I. Race Discrimination

Buffkins contends that the officers violated 42 U.S.C. § 1981 (1988) because they detained her solely on the basis of her race. We disagree.

Buffkins failed to show that the officers' actions were racially motivated by purposeful discrimination. *See General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391 (1982); *Washington v. Simpson*, 806 F.2d 192, 197 (8th Cir. 1986). The officers admittedly identified Buffkins in part because of her race. We conclude, however, that the officers' identification of Buffkins' was reasonable and nondiscriminatory in light of the fact that her race matched the racial description of the person described in the tip. *See United States v. Bautista*, 684 F.2d 1286, 1289

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[7] Unlike many individuals who fit the "drug courier profile," Buffkins was neither the first nor the last passenger to deplane, she did not pay cash for her plane ticket, and she was not making a quick turn-around trip. Moreover, she had identification that was consistent with her airline ticket, she checked her luggage, and she did not arrive on an early flight when few police are present.

(9th Cir. 1982) (police may detain a person for further investigation when, together with other relevant facts, the person's race matches the racial description of persons suspected of criminal activity), *cert. denied*, 459 U.S. 1211 (1983).[8]

II. Fourth Amendment Claim

Buffkins argues that the district court erred by directing a verdict in favor of the police officers on the ground that they had a reasonable and articulable suspicion to detain her at the airport. We agree. We hold as a matter of law that the seizure of Buffkins' by the police officers was illegal and violative of the plaintiff's constitutional right to be free from an unreasonable search and seizure. Thus, Buffkins is entitled to redress under 42 U.S.C. § 1983.

A. "Seizure"

Not all encounters between police officers and citizens involve "seizures" of persons within the meaning of the Fourth Amendment. *See, e.g., Florida v. Royer*, 460 U.S. 491, 497 (1983) (recognizing that officers do not violate the Fourth Amendment simply by approaching an individual in a public place and asking the individual to answer some questions); *United States v. Mendenhall*, 446

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[8] We note, however, that our conclusion would be very different if the officers, acting without a tip, focused their investigation on Buffkins solely because of her race. *See infra* note 12.

U.S. 544, 555 (1980). The Fourth Amendment's proscription against unreasonable seizures is implicated, however, if an "officer, by means of physical force or show of authority, . . . in some way restrain[s] the liberty of a citizen." *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968). In *United States v. Mendenhall*, 446 U.S. at 554, a plurality of the Supreme Court held that a person is seized "if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."

The defendants argue that Buffkins voluntarily consented to be taken from the main terminal to a private office for a search and further questioning. The record refutes this claim.[9] Buffkins protested the search and the questioning, accusing the officers of racial bias. Although Buffkins went to the office willingly, this fact does not establish any more than acquiescence to authority, not

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[9] Buffkins testified that the officers informed her that they needed her to come with them and told her to bring her bags. Jt. App. at 65. She stated that she never agreed nor wanted to go with the officers but that she followed the officers because she felt she was "supposed to do what [they] asked [her to do] as long as it [was] not something illegal." *Id.* She also stated that she did not believe she could leave at that point because she feared a "physical altercation" with the officers. *Id.* at 65-6. She testified that each of the officers picked up a bag and escorted her and her sister to the office on the other side of the terminal. *Id.* at 66. The officers walked directly behind the two women and carried the luggage with their outside hand. *Id.* Moreover, Officer Friend testified that Buffkins was "abusive and confrontational the entire time that she was with us." *Id.* at 378.

voluntary consent. *See Florida v. Royer*, 460 U.S. at 497 (State's burden of showing that the necessary consent was freely and voluntarily given is not satisfied by merely showing submission to a claim of lawful authority).

We conclude that the initial consensual encounter between Buffkins and the officers became a seizure at least at the point when the officers requested Buffkins to accompany them to the office. The officers at that time seized her luggage. In addition, the officers specifically asked Buffkins to accompany them to the office but they informed her sister Nwachakwu that she was free to go.[10] A reasonable person would reasonably infer from the officers' conflicting statements to her and Nwachakwu that she had no choice but to go with the officers. Under the existing circumstances, Buffkins could not have reasonably believed that she was free to leave. The officers concede they never told Buffkins that she was free to leave. Although a seizure does not automatically occur if an officer does not inform a detainee that he or she is free to leave, the absence of such notice may imply that the detainee is being restrained. *Florida v. Royer*, 460 U.S. at 501. Moreover, Buffkins' protestations that the officers' conduct was racist and unconstitutional and the officers' actions in picking up her luggage reinforces our belief

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[10] Buffkins testified as follows: "I was told that I and my baggage had to go with Officer Grigsby and Officer Friend. At that time they turned to my sister Cheryl and they told Cheryl that she could leave, if she wanted to." Jt. App. at 117.

that Buffkins reasonably believed she was seized for the purposes of the Fourth Amendment.[11]

B. Reasonable Articulable Suspicion

For the seizure of Buffkins to be constitutional under the Fourth Amendment, the officers must have had a reasonable articulable suspicion that she had committed or was about to commit a crime. *See Terry v. Ohio*, 392 U.S. at 21. Reasonable suspicion must be formed before the seizure occurs. Although the officers did not need to have probable cause before they seized Buffkins, they must have had more than an unparticularized hunch or suspicion that she was importing cocaine into the Omaha area. *Id.* at 27. To determine whether reasonable suspicion exists, it is necessary to consider the totality of the circumstances. *United States v. Cortez*, 449 U.S. 411, 417 (1981). In *United States v. Sokolow*, 490 U.S. 1, ___, 109 S. Ct. 1581, 1586-87 (1989), the Supreme Court recognized

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[11] The facts in *United States v. Drinkard*, 900 F.2d 140 (8th Cir. 1990), are similar to the facts in the present case. In *Drinkard*, the DEA received a tip that a person with Drinkard's characteristics would smuggle drugs into Kansas City from Houston by air. When the officers saw Drinkard at the airport, they approached him, asked him if he had any drugs in his bag, told him they were attempting to stop drugs from entering the Kansas City airport and asked him if they could search his luggage. One agent identified himself twice as a DEA agent and Drinkard was never told that he was free to leave. We held that Drinkard was subjected to a *Terry*-type investigative stop. *Id.* at 142. As in *Drinkard*, the officers in the present case did not tell Buffkins she could leave, they identified themselves as officers conducting a narcotics investigation, and they asked Buffkins if they could search her luggage.

that under certain circumstances, "wholly lawful conduct might justify the suspicion that criminal activity was afoot" depending upon the "degree of suspicion that attaches to particular types of noncriminal acts."

After viewing the totality of the circumstances in the present case, we find the record totally devoid of *any* facts or circumstances that would permit a finding that the officers possessed a reasonable articulable suspicion that Buffkins was carrying drugs into the Omaha area. Both officers testified that Buffkins did not have any of the characteristics common to drug couriers. The officers stopped Buffkins solely because her race fit the racial description of the person described in the tip. Contrary to the district court's holding, Buffkins' race, apart from any other information known to the officers, clearly could not create a reasonable and articulable suspicion of criminal activity.[12] Innocent travellers cannot "be subject to virtually random seizures" merely because of their race. *See Reid v. Georgia*, 448 U.S. at 441. The officers could not

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[12] In *United States v. Taylor*, 917 F.2d 1402, 1990 WL 161263 (6th Cir.), Taylor, a black individual, was detained by three plainclothes officers at the Memphis International Airport. At the time Taylor was stopped, he was the only black person who had deplaned a flight arriving from Miami, Florida. At the evidentiary hearing, one of the officers who detained Taylor testified that seventy-five percent of the people that the drug task force follows are black. *Id.* at ___, WL at 6. The Sixth Circuit held that the detention was unlawful. *Id.* at ___, WL at 5. The court noted that "the agents were more apt to stop Taylor because of his race" and that it could not "allow blacks and other minorities to become subject to unreasonable stops and governmental intrusions in airports because of their race." *Id.* at ___, WL at 6.

have narrowed their suspicion to a particular individual based on the tip alone. The tip was very indefinite in that it did not state how many individuals on the flight were involved in the illicit activity or give a physical description of the sex, height, weight, clothing, or other characteristics of the person[s] who would be carrying the drugs. In order to constitute a reasonable articulable suspicion the known facts must reasonably relate to the person about to be stopped and demonstrate a reasonable suspicion that the person has engaged or will engage in criminal activity. The officers also assert that prior to their approach of Buffkins, they noticed that Buffkins was carrying a teddy bear with seams that appeared to have been resewn. However, this additional fact cannot create a reasonable articulable suspicion. There is nothing suspicious about a passenger deplaning an airplane carrying a toy animal. Furthermore, Hollis left the airport without taking the bear with her. Officer Friend specifically testified at trial that a drug courier would have wanted to get the teddy bear out of the airport as soon as possible if it contained drugs.[13]

"Based upon the whole picture, [the officers could not have] . . . reasonably surmise[d] that . . . [Buffkins] was engaged in criminal activity." *Cortez*, 449 U.S. at

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[13] The defendants also argue that they believed that Hollis appeared nervous while waiting for the plane to land. Nervousness alone, however, would not have supplied the officers with the suspicion necessary for a *Terry*-type stop. *See United States v. Andrews*, 600 F.2d 563, 566 (6th Cir.) (nervousness is entitled to *no* weight because it is consistent with behavior of innocent airport travellers), *cert. denied*, 444 U.S. 878 (1979); *United States v. Gooding*, 695 F.2d 78, 84 (4th Cir. 1982).

421-22. Thus, we conclude that the officers did not, as a matter of law, possess any reasonable articulable suspicion to detain Buffkins in the manner described. We hold the district court erred in directing a verdict for the police officers on Buffkins' Fourth Amendment claim.[14]

III. Unlawful Arrest

The officers arrested Buffkins for violating section 20-42 of the Omaha disorderly conduct ordinance which provides as follows:

> It shall be unlawful for any person purposely or knowingly to cause inconvenience, annoyance or alarm or create the risk thereof to any person by: (a) Engaging in fighting, threatening or violent conduct; or (b) Using abusive, threatening or other fighting language or gestures; or (c) Making unreasonable noise.

Omaha Mun. Code § 20-42. Buffkins contends her arrest was unlawful because the officers could not have reasonably believed that they had probable cause to arrest her for using fighting words. She also argues that the City of Omaha was improperly dismissed as a defendant in this lawsuit because the City was partly responsible for her unlawful arrest.

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[14] In a section 1983 action, the jury decides whether or not an individuals has been seized within the meaning of the Fourth Amendment only if reasonable persons could differ on the conclusions to be drawn from the evidence. *See Pliska v. City of Stevens Point, Wisconsin*, 823 F.2d 1168, 1177 (7th Cir. 1987). In the present case, however, no evidentiary facts exist which validate the officers' conduct in making the seizure and search.

A. Dismissal of the City of Omaha

Buffkins argues the district court erred by dismissing the City of Omaha as a defendant. She contends that her unlawful arrest was caused in part by the City's failure to repeal subsection (c) of the Omaha disorderly conduct ordinance. *See City of Canton v. Harris*, 489 U.S. 378 (1989) (holding that a municipality may be liable under 42 U.S.C. § 1983 if there is a direct causal connection between a municipal policy or custom and the alleged constitutional deprivation). We agree.

In 1985, the Nebraska Supreme Court observed that subsection (c) of the disorderly conduct ordinance was "unconstitutionally suspect" but held that in the particular case the defendant lacked standing to challenge the subsection. *State v. Groves*, 219 Neb. 382, 385, 363 N.W.2d 507, 510 (1985). Four years later, the United States District Court for the District of Nebraska declared the unreasonable noise subsection of the Omaha disorderly conduct ordinance (subsection (c)) unconstitutional. *Langford v. City of Omaha*, CV 86-0-331 (Memorandum Op. Feb. 17, 1989). The court reached the "inescapable" conclusion:

> that the instant ordinance, using no more than the word 'unreasonable' to define what noise is prohibited and being void of indication as to whose sensitivity shall measure a violation lacks that definiteness, both in notice of what conduct is prescribed and in establishment of guidelines for enforcement which precedent has firmly declared to be essential.

Langford v. City of Omaha, CV. 86-0-331 (quoting Magistrate's Findings and Recommendations, slip op. at 13). Based on the holding in *Langford v. City of Omaha*, the trial

court in the present case declared section 20-42(c) of the Omaha disorderly conduct ordinance unconstitutional and granted Buffkins' summary judgment motion with respect to her claim that section 20-42(c) is facially unconstitutional. At the time of Buffkins' arrest, the City of Omaha had not repealed subsection (c) of the disorderly conduct ordinance even though the Nebraska Supreme Court had questioned the constitutionality of that subsection approximately two years before Buffkins was arrested. Moreover, when the Nebraska federal district court finally declared section 20-42(c) unconstitutional, it relied on caselaw that clearly predated the arrest of Buffkins. In addition, at the time of Buffkins arrest, several other federal courts had held statutes or ordinances with provisions similar to subsection (c) of the Omaha disorderly conduct ordinance unconstitutional. *See, e.g., Pritikin v. Thurman,* 311 F. Supp. 1400, 1402 (S.D. Fla. 1970); *Original Fayette County Civic v. Welfare League, Inc. v. Ellington,* 309 F. Supp. 89, 92 (W.D. Tenn. 1970). As a result of the City's failure to repeal subsection (c), Officers Friend and Grigsby relied on the unconstitutional portion of the disorderly conduct ordinance to arrest Buffkins.[15] We therefore hold the City of Omaha was improperly dismissed as a party defendant in this lawsuit.

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[15] Under the circumstances, we find the record undisputed that the officers arrested the plaintiff under the unconstitutional subsection of the ordinance. Officer Friend testified at trial that he arrested Buffkins for violating the "fighting words" subsection *and* the "unreasonable noise" subsection of

(Continued on following page)

B. Fighting Words

Buffkins also argues the district court should have found as a matter of law that the arresting officers could not have reasonably concluded that they had probable cause to arrest her for using a "fighting word." We agree.

The Supreme Court held in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), that "fighting words" are not protected speech under the First and Fourteenth Amendments. The *Chaplinsky* Court defines "fighting words" as words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* "Fighting words" are words that are "likely to cause an average addressee to fight." *Id.* at 573. Based on the holding in *Chaplinsky*, the Nebraska Supreme Court construed subsections (a) and (b) of the Omaha disorderly conduct ordinance as prohibiting fighting words or

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(Continued from previous page)

the disorderly conduct ordinance. He testified as follows: "during the entire time she was in that room, she spoke several octaves higher than the average conversational tone, and I took that into consideration upon arresting her for calling me an 'asshole.' " Jt. App. at 206. Friend also admitted that he considered it "abusive" that she was loud and vigorous and used certain mannerisms while she advocated her constitutional rights. Jt. App. at 386.

Officer Grigsby also testified at trial that he assisted and concurred in the arrest because Buffkins used the word asshole and exhibited a loud attitude throughout the interview. Jt. App. at 242. He admitted that Buffkins' loud attitude was covered by subsection (c), the unreasonable noise subsection of the disorderly conduct ordinance. Jt. App. at 243.

conduct. *State v. Groves*, 219 Neb. 382, ___, 363 N.W.2d 507, 510 (1985).

We conclude that the district court should have found as a matter of law that the officers did not have probable cause to arrest Buffkins for using "fighting words."[16] *See Cavazos v. State*, 455 N.E.2d 618 (Ind. 1983) (holding as a matter of law that calling a police officer an "asshole" does not constitute fighting words); *People v. Gingello*, 324 N.Y.2d 122 (1971) (holding that the words "you are an asshole" directed to a police officer are not "fighting words"). There is no evidence that Buffkins' speech was an incitement to immediate lawless action. Neither arresting officer contended that Buffkins became violent or threatened violence. Moreover, both officers admitted that nobody outside the interview room heard Buffkins' comment. In addition, Buffkins' use of the word "asshole" could not reasonably have prompted a violent response from the arresting officers. In *Houston v. Hill*, 482 U.S. 451, 462 (1986), the Supreme Court recognized that the "fighting words" doctrine may be limited in the case of communications addressed to properly trained police officers because police officers are expected to exercise greater restraint in their response than the average citizen. The *Houston* Court stated:

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[16] Because of our holding, we need not determine whether the district court erred by failing to instruct the jury as to the legal definition of "fighting words" or by failing to instruct the jury as to the personal liability of the officers for arresting Buffkins under subsection (c) of the Omaha disorderly conduct ordinance.

(Continued on following page)

> [T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers. . . . The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.

Id. at 461-63.

CONCLUSION

In summary, we affirm the district court's holding that the investigatory stop of Buffkins was not racially motivated. However, we hold the officers did not have a reasonable and articulable suspicion to effect a seizure of Buffkins as a mater of law. We find that Buffkins' arrest was made under both the "fighting language" and "unreasonable noise" subsections of the city ordinance. The City had notice of the unconstitutionality of the "unreasonable noise" subsection and therefore the City was improperly dismissed. We also hold that Buffkins'

(Continued from previous page)

The district court also erred in submitting the legal question of qualified immunity to the jury. *See Fields v. City of Omaha*, 810 F.2d 830, 834 (8th Cir. 1987). This is a question of law to be determined from all of the existing facts and circumstances based on whether reasonable officers knew or should have known that their conduct was violative of constitutional law. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Here, as we have discussed, *no* evidentiary facts exist to allow a reasonable officer to believe the seizure and subsequent arrest of Buffkins were legal. We hold as a matter of law the officers possessed no evidentiary basis on which to assert a qualified immunity defense.

speech directed at the officers did not constitute "fighting words." Accordingly, the judgment of the district court is affirmed as to the dismissal of plaintiff's claim under section 1981; we otherwise vacate the judgment in favor of the defendants and remand all of plaintiff's other claims, both state and federal, to the district court for a new trial.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-1319NE

Lu Ann Buffkins, Appellant, vs. City of Omaha, Douglas County, Nebraska, a Municipal Corporation; Alvin Grigsby; and, John Friend, Appellees.	*	Order Denying Petition for Rehearing and Suggestion for Rehearing En banc.

Appellees' suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

February 15, 1991

ORDER ENTERED AT THE DIRECTION OF THE COURT
/s/ Robert D. St. Vrain
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-1319NE

Lu Ann Buffkins, Appellant, vs. City of Omaha, Douglas County, Nebraska, a Municipal Corporation; Alvin Grigsby; and, John Friend, Appellee.	*	Appeal from the United States District Court for the District of Nebraska Cv 87-0-370

JUDGMENT
(Filed Apr. 8, 1991)

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in part, vacated in part and remanded with directions for proceedings consistent with the opinion of this Court.

December 28, 1990

A true copy.

ATTEST: /s/ Robert D. St. Vrain
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

MANDATE ISSUED: 4/2/91

APPENDIX "D"

UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA

LU ANN BUFFKINS, Plaintiff, -vs- CITY OF OMAHA, Douglas County, Nebraska, a Municipal Corporation; ALVIN GRIGSBY, and JOHN FRIEND, Defendants.	*	CIV 87-0-370 ORDER (Filed Dec. 28, 1989)

The plaintiff's Motion for Judgment Notwithstanding the Verdict came on for hearing on December 27, 1989 by conference telephone, with the plaintiff appearing by Robert V. Broom and with the defendants appearing by Thomas O. Mumgaard, and

After arguments of counsel and upon the record herein,

IT IS ORDERED:

(1) That plaintiff's Motion for Judgment Notwithstanding the Verdict is denied.

Dated this 27th day of December, 1989.

BY THE COURT:
/s/ John B. Jones
United States District Judge

ATTEST:
WILLIAM L. OLSON, CLERK
BY: /s/ Illegible
(SEAL) DEPUTY

APPENDIX "E"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

LU ANN BUFFKINS Plaintiff, vs. ALVIN GRIGSBY AND JOHN FRIEND Defendants.	)	Cv. 87-0-370 JUDGMENT (Filed Sep. 1, 1989)

This action came on for trial before the Court and jury; Honorable John B. Jones, Judge, presiding, the issues having been duly tried and the jury having duly rendered its verdict;

IT IS ORDERED AND ADJUDGED that the plaintiff take nothing; that the action is dismissed on the merits with prejudice; and that the defendants, Alvin Grigsby and John Friend, recover of the plaintiff, Lu Ann Buffkins, taxable costs of this action.

Dated at Omaha, Nebraska, this 1st day of September 1989.

WILLIAM L. OLSON
CLERK OF THE COURT

/s/ Nancy C. Vadnais
NANCY C. VADNAIS
DEPUTY CLERK

APPENDIX "F"

* * *

[p. 520] THE COURT: Very well. The defendant has rested. Does the plaintiff desire to make any motions at this time?

MR. BROOM: Plaintiff would move the Court for a directed verdict as to liability of the City of Omaha for implementing, enacting and maintaining an un-Constitutional ordinance under which LuAnn Buffkins was arrested, both as to [p. 521] subsections (b) and (c), and for not limiting the application of the ordinance to fighting words only, in light of the fact that for many years back the State Supreme Court said it must be fighting language, but it continues to reflect words other than fighting language under the ordinance. So we would move for a directed verdict on the liability of the City.

We would move for a directed verdict, as a matter of law, the defendants Grigsby and Friend are liable for having falsely arrested and imprisoned Miss Buffkins, and for having prosecuted and brought charges against her in violation of her First Amendment rights, in view of the fact as a matter of law the use of the word "asshole" in this case is not a fighting word.

We further move for a directed verdict against the individual defendants Grigsby and Friend for having arrested her based solely on her race.

We would move for a directed verdict as to the State claims for false arrest, false imprisonment, for the same reasons as to the Section 1983 claims previously noted.

And for the record, we would once again request the Court to reconsider its ruling with respect to the initial stop and detention. As a matter of law, we believe the plaintiff is entitled to a directed verdict that in fact the initial stop and detention by the officers was a violation of Miss Buffkins' Constitutional rights pursuant to Section [p. 522] 1983, and we think she is entitled to a directed verdict in that regard.

MR. FELLOWS: We are willing to submit the motion without argument, Your Honor.

THE COURT: The plaintiff's motion for directed verdicts will be denied, and the motion to reconsider the Court's prior ruling will be likewise denied.

APPENDIX "G"

JURY INSTRUCTION
NO. 15

You are instructed that the Omaha disorderly conduct ordinance provides:

Section 20-42. *Disorderly Conduct*

It shall be unlawful for any person purposely or knowingly to cause inconvenience, annoyance or alarm or create the risk thereof to any person by:

(a) Engaging in fighting, threatening or violent conduct; or

(b) Using abusive, threatening or other fighting language or gestures; or

(c) Making unreasonable noise.

You are instructed that subsection (c) of the disorderly conduct ordinance has been ruled by this court to be unconstitutionally vague.

You must first determine whether defendants Grigsby and Friend had probable cause to believe that the conduct of the plaintiff in using the word "asshole" violated subsection (b) of the disorderly conduct ordinance. If you find they did have probable cause for plaintiff's arrest, you must return a verdict for the defendants.

If you find that the defendants did not have probable cause to arrest the plaintiff under this ordinance, you must then determine whether the defendants Grigsby and Friend are entitled to qualified immunity, as set out in Instruction 18.

If you find that defendants Grigsby and Friend did not have probable cause to arrest the plaintiff and are not entitled to qualified immunity, you must return a verdict for the plaintiff and against defendants Grigsby and Friend on both the civil rights claim and the false arrest claim.

APPENDIX "H"

STATE OF NEBRASKA, APPELLEE, V.
KEVIN R. GROVES, APPELLANT.

363 N.W.2d 507

Filed March 1, 1985. No. 84-282.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Michael T. Levy of Levy & Lazer, P.C., for appellant.

Herbert M. Fitle, Omaha City Attorney, Gary P. Bucchino, Omaha City Prosecutor, Richard M. Jones, and David F. Smalheiser, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, and SHANAHAN, J.J., and COLWELL, D.J., Retired.

WHITE, J.

Appellant, Kevin R. Groves, was convicted after trial in the municipal court of the city of Omaha, Douglas County, Nebraska, of the offense of disorderly conduct as defined by Omaha Mun. Code § 20-42 (1980). The district court for Douglas County affirmed the conviction but modified the sentence of the municipal court from 75 to 20 days. He appeals to this court.

Two assignments of error are advanced, which may be summarized as follows. Section 20-42 is unconstitutional because it is overbroad in that it applies to protected conduct under the Constitution of the United States and the Constitution of the State of Nebraska, and this section is vague in that it fails to give fair and adequate notice of the type of conduct prohibited and is susceptible to arbitrary enforcement. We shall consider

the assignments together. A brief recitation of the facts is necessary.

On October 5, 1983, Edward Hale, a police officer of the city of Omaha, was working as a private security guard at the Holiday Inn motel complex at 3321 South 72d Street, Omaha, Nebraska. The complex consists of a number of buildings and a large 14-acre parking lot. Officer Hale's employment included patrolling the parking lot in a truck to provide security for vehicles parked there. At about 3:40 a.m. Officer Hale observed the appellant, Groves, in the far east part of a parking lot, standing next to a Cadillac automobile. The parking lot was located approximately 200 feet from the nearest building. Officer Hale approached Groves, who was about 100 feet from him. As the officer neared Groves, he observed what appeared to be a pair of boltcutters in his right rear pocket. When Officer Hale pulled within 10 feet of Groves, Groves started to walk away. Officer Hale identified himself as a police officer, produced his badge, and showed it to Groves. Groves' response was, "What the fuck do you want?" Officer Hale responded that he wished to see his identification. Groves reached into his pocket, got out his driver's license, gave it to the police officer, and advanced toward Officer Hale in what Hale described as a menacing manner. Groves' words at that time were, "I don't give a fuck, give a fuck who you are." In response, Officer Hale produced his revolver and pointed it at Groves. Groves then started walking to his own automobile about 40 feet from where the Cadillac was parked. Officer Hale summoned assistance from the Omaha Police Department and, approximately 8 minutes later, several cruisers responded.

Before assistance arrived, appellant stepped inside his car, backed it out, and parked it near where Officer Hale's truck was stopped. Groves came out of his car, aware the Officer Hale had called for assistance, and called Officer Hale a "motherfucker" and a "pig" and requested the officer to try to arrest him singlehandedly. At the time of this confrontation Officer Hale observed a sheath on the defendant's hip, partially concealed beneath his coat. Officer Hale recognized the sheath as one that typically contained a "Buck knife." When additional police officers arrived, Groves called one of the summoned officers a "fuckhead," and a struggle ensued with the officer before Groves was forcibly handcuffed and arrested. The boltcutters observed by Officer Hale were recovered from under the front seat of Groves' car.

Section 20-42 of the Omaha Municipal Code provides as follows: "It shall be unlawful for any person purposely or knowingly to cause inconvenience, annoyance or alarm or create the risk thereof to any person by: (a) Engaging in fighting, threatening or violent conduct; or (b) Using abusive, threatening or other fighting language or gestures; or (c) Making unreasonable noise." We shall address the vagueness and overbreadth arguments together.

Recently, in *State v. Frey*, 218 Neb. 558, 357 N.W.2d 216 (1984), we had occasion to consider the constitutionality of Neb. Rev. Stat. § 28-305(1) (Reissue 1979) with respect to a manslaughter charge. We said in that case at 561-62, 357 N.W.2d at 219:

> *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362

> (1982), teaches that in a facial challenge to the overbreadth and vagueness of a law, that is, in this context, a claim that the law is invalid in toto and therefore incapable of any valid application, our first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. We are to then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, uphold the challenge only if the enactment is impermissibly vague in all its applications. In order to have standing to challenge a vague statute, one must not have engaged in conduct which is clearly proscribed by the statute, and cannot complain of the vagueness of the law as applied to the conduct of others.

Therefore, applying the language of *State v. Frey* to this case, our first question, then, is whether or not the enactment reaches a substantial amount of constitutionally protected conduct. It does not. As we observed in *State v. Boss*, 195 Neb. 467, 471, 238 N.W.2d 639, 643 (1976):

> The word abuse and similarly broad terms in like statutes have been held to pass constitutional muster under the First Amendment to the Constitution of the United States only if they are construed so as to apply the statute to punish only what have been called "fighting words." Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031. . . . " '[F]ighting' words [are] 'those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.' "

We hold that the words "fuckhead" and "motherfucker" are such fighting words, and we again specifically reject the implicit argument advanced by appellant

that a police officer is somehow less susceptible to abuse than other members of the general public. As we said in *Boss*:

> We specifically reject the authority of Williams v. District of Columbia, 419 F.2d 638, and the concurrence of Mr. Justice Powell in Lewis v. City of New Orleans, *supra*, wherein it is suggested that the words here used cannot be fighting words when directed to a police officer because he is trained to accept such abuse without violent reaction.

Id.

As Groves' conduct is not constitutionally protected, the overbreadth argument must be rejected. We are, then, now to conclude whether or not the ordinance is vague. Section 20-42(c) is constitutionally suspect. We are again faced with the defendant's lack of standing to attack this record. We have said, to repeat the words in *State v. Frey*, *supra* at 561-62, 357 N.W.2d at 219: "In order to have standing to challenge a vague statute, one must not have engaged in conduct which is clearly proscribed by the statute, and cannot complain of the vagueness of the law as applied to the conduct of others." As the ordinance clearly applied to prohibited conduct engaged in by Groves, he lacks standing to suggest that the ordinance may be impermissibly applied to others. The assignments of error are without merit. The judgment and sentence of the trial court are affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I must respectfully dissent from the majority opinion in this case. I do so on three specific grounds. First, I

believe that the majority opinion is in error in its declaration that in order for one to maintain a facial challenge to the overbreadth and vagueness of a law where the enactment does not reach a substantial amount of constitutionally protected conduct, the challenge can be upheld only if the enactment is impermissibly vague in *all* of its applications. Second, I believe that the language of the statute is impermissibly vague, and therefore unconstitutional. Third, I believe that the facts of the case fail to establish that the defendant committed the crime for which he was charged and convicted.

I turn first to the question of when a facial challenge as to overbreadth or vagueness can be maintained. I am afraid that just as the U.S. Supreme Court got onto a wrong track when it decided the case of *Hoffman Estates v. Flipside, Hoffman Estates,* 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982), so too did this court get onto the wrong track when we recently decided the case of *State v. Frey,* 218 Neb. 558, 357 N.W.2d 216 (1984). The majority opinion in the instant case continues along that wrong trail.

In *Frey,* relying upon what we perceived to be the position of the U.S. Supreme Court in *Hoffman Estates,* we held that Frey lacked standing to challenge the constitutionality of the statute in question, because in order for one to have standing to challenge a vague statute, one must not have engaged in conduct which is clearly proscribed by the statute, and cannot complain of the vagueness of the law as applied to the conduct of others unless the statute is impermissibly vague in all its applications.

A closer examination of the opinion in *Hoffman Estates*, in light of a later decision of the U.S. Supreme Court, *Kolender v. Lawson*, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983), leads one to the inescapable conclusion that *Hoffman Estates* does not stand for such a rule and, in any event, does not reflect the law in this jurisdiction.

First, *Hoffman Estates* involved a preenforcement facial challenge of a civil statute seeking to regulate an economic matter. As observed by the majority in *Hoffman Estates, supra* at 498-99:

> These standards should not, of course, be mechanically applied. The degree of vagueness that the Constitution tolerates – as well as the relative importance of fair notice and fair enforcement – depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe. And the Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.
>
> Finally, perhaps the most important factor affecting the clarity that the Constitution

> demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply.
>
> This ordinance simply regulates business behavior and contains a scienter requirement with respect to the alternative "marketed for use" standard. The ordinance nominally imposes only civil penalties.

Any other reference in the *Hoffman Estates* opinion to criminal action and the standards required in such criminal actions is mere dicta.

The majority opinion in *Hoffman Estates, supra* at 497, said:

> A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague, in violation of due process. To succeed, however, the complainant must demonstrate that the law is impermissibly vague in all of its applications.

No authority was cited for that proposition other than *Hoffman Estates* itself. Furthermore, this passage must be read in light of the Court's specific acknowledgment that commercial regulation is subject to a relaxed vagueness analysis. As noted earlier, even the *Hoffman Estates* opinion recognizes that legislation interfering with first amendment interests is examined under "a more stringent vagueness test."

Apparently, the U.S. Supreme Court has recognized the error of *Hoffman Estates* and has already abandoned

its teachings. We should do likewise. In *Kolender v. Lawson, supra,* the U.S. Supreme Court was asked to pass upon the constitutionality of a California penal statute which provided:

> Every person who commits any of the following acts shall be guilty of disorderly conduct, a misdemeanor: . . . (e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.

See Cal. Penal Code § 647(e) (West 1970). The petitioner was detained or arrested on approximately 15 occasions, though he was only prosecuted twice and convicted once. He then brought a civil action seeking a declaratory judgment that § 647(e) is unconstitutional. Neither the facts as presented to the U.S. Supreme Court nor the statute itself is such that it would be vague in all of its applications. Obviously, one who had just committed a crime and was wandering about the street without apparent reason might be asked to identify himself and to account for his presence. Nevertheless, the U.S. Supreme Court struck the statute down as being unconstitutionally vague. In doing so the Court said:

> As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. [Citations omitted.] Although the doctrine focuses both on actual notice to citizens and

> arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine "is not actual notice, but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement."

Kolender v. Lawson, 461 U.S. 352, 357-58, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983). In n.8 to the opinion the Court addressed the *Hoffman Estates* opinion, saying at 358-59:

> In his dissent, JUSTICE WHITE claims that "[t]he upshot of our cases . . . is that whether or not a statute purports to regulate constitutionally protected conduct, it should not be held unconstitutionally vague on its face unless it is vague in all of its possible applications." [Citation omitted.] The description of our holdings is inaccurate in several respects. First, it neglects the fact that we permit a facial challenge if a law reaches "a substantial amount of constitutionally protected conduct." [Citation omitted.] Second, where a statute imposes criminal penalties, the standard of certainty is higher. [Citation omitted.] This concern has, at times, led us to invalidate a criminal statute on its face even when it could conceivably have some valid application. See, *e.g.*, *Colautti v. Franklin*, 439 U.S. 379, 394-401 (1979); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). The dissent concedes that "the overbreadth doctrine permits facial challenge of a law that reaches a substantial amount of conduct protected by the First Amendmen. . . . " [Citation omitted.] However, in the dissent's view, one may not "confuse vagueness and overbreadth by attacking the enactment as being vague as applied to conduct other than his own." [Citation omitted.] But we have traditionally viewed vagueness and overbreadth as logically related and similar doctrines. See, *e.g.*, *Keyishian v. Board of Regents*, 385 U.S. 589, 609

(1967); *NAACP v. Button*, 371 U.S. 415, 433 (1963). . . .

> No authority cited by the dissent supports its argument about facial challenges in the arbitrary enforcement context. . . . *Hoffman Estates, supra*, also relied upon by the dissent, does not support its position. In addition to reaffirming the validity of facial challenges in situations where free speech or free association are affected [citation omitted], the Court emphasized that the ordinance in *Hoffman Estates* "simply regulates business behavior" and that "economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow." [Citation omitted.]

I am firmly convinced that should we continue to follow the trail mistakenly set out for us by the unsupported authority in *Hoffman Estates*, we shall wind up at a dead end and be compelled to find our own way back. We should abandon that trail now, concede that we were misled, and once again reestablish what has long been the rule, both in this jurisdiction and in the federal jurisdiction as well. See *State v. Hamilton*, 215 Neb. 694, 340 N.W.2d 397 (1983).

At least where the legislation arguably impinges on first amendment values, I believe the rule to be as expressed by the U.S. Supreme Court in *Gooding v. Wilson*, 405 U.S. 518, 521, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1971), wherein the Court said:

> "Although a statute may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or unconstitutional overbreadth as applied to others. And if the law is found deficient in one

> of these respects, it may not be applied to him either, until and unless a satisfactory limiting construction is placed on the statute. The statute, in effect, is stricken down on its face. This result is deemed justified since the otherwise continued existence of the statute in unnarrowed form would tend to suppress constitutionally protected rights."

See, also, *Lewis v. City of New Orleans*, 415 U.S. 130, 94 S. Ct. 970, 39 L. Ed. 2d 214 (1974); *Plummer v. City of Columbus*, 414 U.S. 2, 94 S. Ct. 17, 38 L. Ed. 2d 3 (1973). All that one can say with regard to the decision in *Hoffman Estates* is that it is an anomaly in the law and, as an anomaly, should be disregarded.

I turn next to the question of whether the ordinance is unconstitutionally vague. As noted by the majority, and as conceded by the city of Omaha, unless this court is able to apply some valid judicial construction limiting the reach of the ordinance solely to constitutionally unprotected speech, we have no choice but to declare the ordinance invalid. I believe that the judicial gloss sought to be applied by the court simply does not adhere and therefore fails to make the test.

The majority has determined that the words "fuckhead" and "motherfucker" are fighting words per se. I believe that not to be the law. In *State v. Boss*, 195 Neb. 467, 472, 238 N.W.2d 639, 643 (1976), relied upon by the majority, we said "we agree that whether any particular use of abusive language constitutes 'fighting words,' depends not only upon the words, but upon the circumstances as well." I believe that under the facts of this case the use of those words could not have constituted fighting words, but I defer that for a moment. At this juncture

I simply address the question of whether the ordinance is vague. In doing so we are reminded that " '[a] crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder. . . . ' " *State v. Hamilton, supra* at 695, 340 N.W.2d at 398. The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime and the elements constituting it must be so clearly expressed that the ordinary person can intelligently choose in advance what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things and providing a punishment for their violation should not permit such a double meaning that the citizen may act upon one conception of its requirements and the courts upon another. A statute which forbids the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application violates the first essential element of due process of law. In *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972), the U.S. Supreme Court referred to these principles in the following manner:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know

> what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

See, also, *State v. Hamilton*, 215 Neb. 694, 340 N.W.2d 397 (1983).

An examination of the ordinance in question is a perfect example of what it was in *Hamilton* about which we were concerned. To begin with, this ordinance on its face not only makes it a crime to use fighting words but, likewise, makes it a crime to engage in a whole host of activities, including making unreasonable noise in such a manner as to cause inconvenience, annoyance, or alarm, or create the risk thereof to *any* person. If two individuals on the street, enjoying the fact that they have accomplished some task, make unreasonable noise, thereby causing annoyance to a third person, the ordinance has been violated. It is difficult to imagine how one could draft an ordinance more vague than the one under consideration. In *Coates v. City of Cincinnati*, 402 U.S. 611, 91 S. Ct. 1686, 29 L. Ed. 2d 214 (1971), the U.S. Supreme Court struck down an unlawful assembly statute prohibiting conduct "annoying to persons passing by." In doing so the U.S. Supreme Court said at 614:

> Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible

> normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, "men of common intelligence must necessarily guess at its meaning."

See, also, *Terminiello v. Chicago*, 337 U.S. 1, 69 S. Ct. 894, 93 L. Ed. 1131 (1949); *Gooding v. Wilson*, 405 U.S. 518, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1971).

The Alaska Supreme Court was called upon to examine a similar ordinance in *Marks v. City of Anchorage*, 500 P.2d 644 (Alaska 1972). In striking down the ordinance the court said at 652-53:

> When these fundamental and long-established principles of constitutional law are applied to the Anchorage ordinance, there is no escape from the conclusion that the ordinance is likewise void for vagueness. Since the prefatory language of the ordinance, containing the mens rea for the specifically enumerated prohibited acts, is itself impermissibly vague, no part of the ordinance can stand. The defective prefatory language is "with purpose and intent to cause public *inconvenience, annoyance* or *alarm* or recklessly create a risk thereof." (emphasis added). Coates v. Cincinnati, *supra*, specifically declared the word "annoying" to be unconstitutionally vague and the words "inconvenience" and "alarm" are not less so. The rest of the ordinance is also peppered with indefinite words. . . .
>
> In sum, not only does the ordinance fail to give adequate notice of what conduct is prohibited, but it is particularly subject to the abuse of uneven enforcement.

The majority seeks to avoid the difficulty presented to us by the ordinance by suggesting that even though some of the ordinance may be invalid, that portion of

Omaha Mun. Code § 20-42(b) (1980) specifically referring to "fighting language" was sufficient to convict. The difficulty with all of that is that Groves was not charged with violating § 20-42(b) by using fighting language. He was charged with a violation of all three parts of § 20-42, and he was found guilty of violating all of § 20-42. We have no way of knowing whether he was found guilty by reason of the court finding that he had in fact used fighting words or simply because he was making unreasonable noise. See *Williams v. District of Columbia*, 419 F.2d 638 (D.C. App. 1968). It is not suggested by this dissent that there may not be a manner in which a constitutional ordinance might be drafted. It is, however, suggested that where the drafters have failed to perform their duties, this court should not undertake to do so.

The simple fact of the matter is that no reasonable person can know in advance what activity is truly prohibited by the provisions of § 20-42. For that reason the ordinance must be declared unconstitutional.

The final reason I believe the majority opinion is in error is because I do not believe the evidence was sufficient to convict Groves of causing inconvenience, annoyance, or alarm by using fighting language.

It is difficult for me to conceive how an officer, with a drawn, loaded service revolver, who is being specifically paid by a private business to provide security of the type that the officer was providing at the moment the altercation occurred, could be either inconvenienced, annoyed, or alarmed by a man with a foul mouth. The only testimony in the record which even remotely establishes

inconvenience, annoyance, or alarm on the part of the police officer is as follows:

> Q. All right. Can you, rather than state a conclusion, "menacing," can you describe what sort of actions or what sort of posture he was in, words expressed to you as he approached you?
>
> A. He says, "I don't give a fuck, give a fuck who you are." And he started towards me in a fashion I felt was menacing to me, to my own safety.

It was at this point that the officer drew his loaded revolver.

It is difficult to conclude that this evidence was sufficient to establish inconvenience, annoyance, or alarm of a man who is being paid to be inconvenienced, annoyed, or alarmed, and therefore permitted to carry a loaded revolver. That fact is further borne out when, on cross-examination, Officer Hale testified as follows:

> Q. Officer Hale, how long have you been a police officer?
>
> A. Twelve years.
>
> Q. You've been called names before, haven't you . . .
>
> A. Many times.
>
> Q. In connection with your duties . . .
>
> A. Yes.
>
> Q. As a police officer? You've been called a motherfucker before, in connection with your duties as a police officer?
>
> A. I have.

Q. It goes with the territory, doesn't it?

A. It does.

Furthermore, it is apparent from the testimony that the arrest occurred before the officer could, under any reasonable circumstance, be inconvenienced, annoyed, or alarmed, even if we knew what those terms meant. One of the arresting officers testified as follows:

> Q. Do you recall any specific language that he used that led you to that conclusion, did you hear any abusive language or threatening language?
>
> A. Yes, quite a bit of swearing in a rather loud tone.
>
> Q. At who?
>
> A. It wasn't directed intitially [sic] at any one in particular, just in a manner of conversation; however . . .
>
> Q. What specific words were used?
>
> A. He used the word fuck several times. I told the party to quiet down or he'd be placed under arrest for disorderly conduct.
>
> Q. What was his response to that?
>
> A. He said, "You're nothin' but a fuckhead."
>
> Q. What happened next?
>
> A. I said, "You're under arrest for disorderly conduct," placed him under arrest.

In effect, then, we have now made words expressed to no one in particular fighting words, thereby permitting an individual to be arrested. The officer had already determined that he was going to arrest Groves if he

continued to make noise, whether he used fighting words directed at anyone or not.

No one condones the use of foul language addressed to anyone, and in particular to a law enforcement officer; yet, finding the use of foul language to be socially unacceptable is not the same as making it the basis for denying one a first amendment right to free speech.

In my view the ordinance is vague and, therefore, in violation of the Constitution. I believe that this is a case in which we can make that determination. I further believe that the evidence is insufficient to establish beyond a reasonable doubt that the officer in question could have been inconvenienced, annoyed, or alarmed. I have difficulty believing that one with a loaded revolver can be annoyed by one with a loaded mouth.

SHANAHAN, J., dissenting.

I join Chief Justice Krivosha in his dissent that the questioned ordinance is unconstitutionally vague, but make additional comment about the ordinance's vagueness. What is sought to be prohibited by the ordinance is "inconvenience, annoyance or alarm," or creating the risk of causing such situations or conditions. To paraphrase the basic prohibition of the ordinance, it is unlawful to make trouble for somebody, to irritate someone, to frighten anybody, or to bring about the possibility or danger of causing trouble, irritation, or fright to anyone. Such nebulous and subjective situations cannot constitutionally be the basis for prosecution. The various subparts of the ordinance are only a futile facade for vagueness.

APPENDIX "I"

OMAHA

MUNICIPAL CODE

Sec. 20-42. Disorderly conduct.

It shall be unlawful for any person purposely or knowingly to cause inconvenience, annoyance or alarm or create the risk thereof to any person by:

(a) Engaging in fighting, threatening or violent conduct; or

(b) Using abusive, threatening or other fighting language or gestures; or

(c) Making unreasonable noise.